DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Qwest Communications International, Inc.	)	WC Docket No. 02-89
	)	
Petition for Declaratory Ruling on the Scope of	)	
The Duty to File and Obtain Prior Approval of	)	
Negotiated Contractual Arrangements	)	
Under Section 252(a)(1)	)	

COMMENTS OF WORLDCOM, INC.

WorldCom, Inc. ("WorldCom") hereby submits its comments in opposition to the above-captioned Petition filed by Qwest.[1] WorldCom opposes Qwest's petition because it is nothing more than an after-the-fact attempt to obtain regulatory relief from the Federal Communications Commission (the "Commission") for Qwest's failure to obtain prior state commission approval of interconnection agreements negotiated under section 252(a)(1) of the Telecommunications Act of 1996 (the "Act").[2]

Six years after passage of the Act, Qwest now claims that there is "uncertainty" and "controversy" that warrants a declaratory ruling concerning what types of interconnection agreements should be submitted for state commission approval. The only controversy here is that Qwest failed to submit for approval certain agreements that it reached with various competitive local exchange carriers ("CLECs"). In essence, Qwest used its monopoly position to extract certain concessions out of certain CLECs in secret

[1] Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1), WC Docket No. 02-89 (filed April 23, 2002).

deals. On its face, section 252(a)(1) requires approval of *all* interconnection agreements. There are no carve-outs or exceptions.

I. INTERCONNECTION AGREEMENTS NEGOTIATED PURSUANT TO SECTION 252(a)(1) MUST BE SUBMITTED, IN THEIR ENTIRETY, TO THE STATE COMMISSION FOR APPROVAL

Section 252(a)(1) requires that negotiated interconnection agreements be submitted to the appropriate state commission. There are no exceptions or limitations on this requirement. Qwest's argument that section 252(a)'s prior approval requirement is limited to rates and associated service descriptions for interconnection, services and network elements is unsupported by a plain reading of the statute, legislative history and the Commission's Local Competition Order.[3]

A. Section 252(a)(1) Requires Approval of All Interconnection Agreements

Qwest's attempt to limit the filing requirement to a "detailed schedule of itemized charges for interconnection and each service or network element included in the agreement"[4] must be rejected. By its terms, section 252(a)(1) mandates that voluntarily negotiated interconnection agreements be submitted to the state commission for approval – in their entirety. Qwest misinterprets section 252(a)(1) to exclude contract provisions from the approval process that do not describe rates or elements.

The language in section 252(a)(1) that Qwest highlights in its Petition does not support Qwest's interpretation. Specifically, section 252(a)(1) provides that

> "The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."

---

[2] 47 U.S.C. § 252(a)(1).
[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted).
[4] Petition at 10.

This section continues with:

> The agreement, including any interconnection agreement negotiated before the date of enactment of the [Act], shall be submitted to the State commission under subsection (e) of this section.

If Congress had intended to limit the filing and approval process to the schedule of charges, the statute would have read like this:

> "The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." [Those portions of the agreement shall be submitted to the State commission under subsection (e) of this section.]

Because the statute was not written in this manner, there is no other logical interpretation to make than that section 252(a)(1) requires interconnection agreements, in their entirety, to be filed and approved by state commissions.

Qwest's comparison of section 252(a)(1) with other provisions of contract approval pursuant to section 252 is wholly irrelevant here. As an initial matter, an SGAT is not a contract, just an offer of terms indicative of what CLECs should receive. The SGAT exists solely as an opportunity to obtain approval under section 271 in states where no CLECs have requested interconnection. Qwest's reference to section 252's arbitration provisions is similarly irrelevant. Subsection (b)'s procedures for arbitrations are separate and apart from subsection (a)'s filing requirements. In any event, in the end, the state commission must approve both negotiated and arbitrated agreements.

B. Legislative History Does Not Support Qwest's Interpretation

Qwest's reliance on the legislative history for section 252(a)(1) for its interpretation is also misplaced.[5] There is nothing in the legislative history that lends

[5] Petition at 13-14.

support for Qwest's argument that the 90-day approval process applies only to contractual provisions that consists of the schedule of charges.

The Conference Report confirms that agreements voluntarily negotiated must be submitted to the state commissions for prior approval. The House did recede to the Senate version of 252(e), which specified that "[a]greements arrived at through voluntary or compulsory arbitration must be approved by the State commission under new section 252(e). . ."[6] The Conference Report evinced no other discussion of negotiated agreements, much less indicated in any way that certain provisions of interconnection agreements need not be approved by the state commission. Even if the Senate encouraged private negotiation of interconnection agreements,[7] that is a long way from exempting provisions from prior approval as required by section 252(a)(1).

C. The Commission Has Interpreted Section 252(a)(1) to Require Approval

WorldCom agrees with Qwest that the Commission has authority to interpret section 252(a) and implement rules. In fact, the Commission has already done so.

In the Local Competition Order, the Commission confirmed that section 252(a) required all interconnection agreements to be submitted to the state commission for approval pursuant to section 252(e).[8] In implementing rules in connection with section 252(a), the Commission made clear that "the final sentence of section 252(a)(1), which requires that *any* interconnection agreement be submitted to the state commission can and should be read to be independent of the prior sentences in section 252(a)(1)."[9] This directly undercuts Qwest's argument that the second sentence of section 252(a)(1) limits

[6] Telecommunications Act of 1996, Conference Report, H. Rep. 104-458, at 125-126.
[7] Petition at 14.
[8] *Local Competition Order*, ¶ 165.

which agreements must be submitted for approval to only those agreements that include itemized charges for interconnection.

II. INTERCONNECTION AGREEMENTS MUST BE APPROVED SO THAT THEY CAN BE AVAILABLE PURSUANT TO SECTION 252(i)

Contrary to Qwest's claim, in fact, it is essentially trying to limit the scope of CLECs' rights to "pick and choose" under section 252(i). Qwest tries to distinguish the agreements that it did not file for approval as beyond the state commission's jurisdiction because the agreements do not relate to schedules of charges and related service descriptions.[10] CLECs can only opt-in to agreements that 1) they know about and 2), that have been approved by the state commission. Qwest's interpretation of section 252(a)(1) would thwart both of these factors. If Qwest does not submit all agreements for interconnection for approval to the state commission, then CLECs will not be able to avail themselves of provisions, or entire agreements, that could facilitate their entry into the local market.

The Commission determined that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable and nondiscriminatory terms. As a result, the Commission declared that the Act does not exempt certain categories of agreements from the filing and approval requirements of section 252(a).[11] The Commission believed, correctly, that "excluding certain agreements from public disclosure could have anticompetitive consequences."[12] The Commission specifically

---

[9] *Id.*, ¶1 66.
[10] Petition at 30-37.
[11] *Local Competition Order*, ¶ 165.
[12] *Id.*, ¶ 168.

cited pre-existing agreements as agreements encompassed by section 252(a), but the Commission's discussion applies equally to the types of agreements that Qwest secretly entered into with other competitive carriers.[13]

The purpose of giving state commissions "the opportunity to review *all* agreements"[14] is to avoid discrimination. The state approval process serves to: 1) enable carriers to have information about rates, terms and conditions that an incumbent local exchange carrier ("ILEC") makes available to others; and 2) make the same terms and conditions for interconnection available to other requesting carriers under section 252.[15] The Commission found that by requiring that all contracts be filed with the state commissions, an ILEC's ability to discriminate among carriers is limited.[16]

It is not for Qwest to decide which agreements, or portions thereof, should be submitted for review and approval by state commissions. By only submitting certain agreements for approval, Qwest is essentially determining which agreements will be available to other CLECs under section 252(i). Furthermore, absent regulatory scrutiny, Qwest can exercise its monopoly power to extract onerous concessions from individual CLECs that are contrary to the public interest. In fact, by all accounts, Qwest entered into these "secret deals" in return for the CLECs' commitments not to oppose Qwest's application for interLATA, in-region authority pursuant to section 271 of the Act.[17]

---

[13] Petition at 20, 31.
[14] *Local Competition Order*, ¶ 165.
[15] *Id.*
[16] *Id.*
[17] *See*, Letter, dated May 15, 2002, from J. Jeffrey Oxley, Vice President, General Counsel and Corporate Secretary, Eschelon to The Honorable Michael W. Lewis, Administrative Law Judge, Office of Administrative Hearings, Minnesota Public Utilities Commission, Docket No. P-421/CI-01-1373, *Investigation Into Qwest's Compliance with Section 271(d)(3) of the Telecommunications Act of 1996 that the Requested Authorization is Consistent with the Public Interest, Convenience and Necessity*, (attached hereto as Exhibit 1). In this Minnesota Public Utilities Commission 271 docket, Mr. Oxley confirmed the

Qwest's unilateral decision to keep certain agreements outside of the approval process is precisely the type of covert activity the Commission sought to avoid and is contrary to the Commission's stated goals.[18]

Qwest tries to minimize the importance of its side agreements with CLECs, but these agreements, or provisions thereof, contain pertinent provisions and require public scrutiny so long as issues of interconnection for local service are involved.[19] Provisions or agreements addressing billing, dispute resolution, service quality or performance and other related provisions related to the Act, are provisions that most, if not all, CLECs need to have in their agreements. It would be patently unfair, for example, if only certain CLECs were given the opportunity to obtain discounted service or training on ILECs' operational support systems. CLECs are the ones that get to decide which agreements, or portions thereof, they want to adopt, not Qwest.

CONCLUSION

Qwest's request for relief should be denied. Qwest is seeking relief from the Commission for its failure to comply with the Act. Qwest was caught making secret deals with CLECs and now it wants the Commission to somehow excuse its behavior as lawful and consistent with the Act . There is no ambiguity in the law here. Qwest should not be rewarded for its violation(s) of section 252(a)(1). The Commission should take all

---

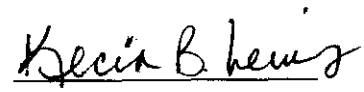
conclusions of the Minnesota Department of Commerce that Qwest had used its control of the network's wholesale division to benefit its retail arm in order to obtain section 271 approval. Mr. Oxley further stated that Qwest leveraged its monopoly power to extract oral and written agreements from CLECs that they would not oppose Qwest's merger or section 271 application. *Id.* at 7-8.

[18] *See*, Confidential Billing Settlement Agreement between U S WEST Communications, Inc. and McLeodUSA, Inc., dated April 28, 2000 (in exchange for resolution of interconnection-related issues, McLeod agreed to withdraw its opposition to the U S WEST and Qwest Corporation merger)(attached hereto as Exhibit 2); U S WEST Service Level Agreement with Covad Communications Company Unbundled Loop Services, dated April 19, 2000 (attached hereto as Exhibit 3). These agreements are now publicly available in Minnesota Public Utilities Commission Docket No. P-421/C-02-197.

appropriate actions necessary in light of Qwest's blatant failure to comply with a key provision of the Act – one designed to protect CLECs from this kind of anticompetitive, discriminatory behavior by ILECs.

Respectfully submitted,

WORLDCOM, INC.



Kecia Boney Lewis
Lisa R. Youngers
1133 19th Street, NW
Washington, DC 20036
(202) 736-6270

Dated: May 29, 2002

EXHIBIT 1

May 15, 2002 NON-CONFIDENTIAL VERSION

The Honorable Michael W. Lewis
Administrative Law Judge
Office of Administrative Hearings
100 Washington Square, Suite 1700
Minneapolis, MN 55401-2138

Re: **MPUC Docket No. P-421/CI-01-1373 - "Investigation Into Qwest's Compliance with Section 271(d)(3) of the Telecommunications Act of 1996 that the Requested Authorization is Consistent with the Public Interest, Convenience and Necessity"**

Dear Judge Lewis:

Pursuant to Minnesota Rules, Part 7829.0900, as well as procedural and evidentiary rules allowing relevant testimony of non-party witnesses, Eschelon Telecom, Inc. (Eschelon), submits these written comments and enclosed affidavit for consideration in this matter. As documents and information relating to Eschelon have been offered into evidence and are the subject of discussion, Eschelon believes it is appropriate to request an opportunity to comment. Eschelon will make witnesses available to respond to questions, if desired. Because Eschelon is responding to materials that have been marked confidential, Eschelon also designates the related portions of these comments, as well as the enclosed affidavit, as confidential.

This is a docket about Qwest and its qualification for 271 approval. As to this over-arching issue, Eschelon agrees with the conclusion of W. Clay Deanhardt, in an affidavit submitted by the Minnesota Department of Commerce (DOC), that there has been "a pattern of Qwest leveraging its control of the network through its wholesale division to benefit the efforts of its retail arm to obtain authority to offer interLATA long distance services." *See* Affidavit of W. Clay Deanhardt, p. 11, lines 3-5, MPUC Docket No. P-421/CI-01-1373 (May 3, 2002) ["Deanhardt Affidavit"]. As part of that pattern, as pointed out in documents introduced by Mr. Deanhardt, Qwest sought to appropriate all documents related to an audit process that documented problems with Qwest's switched access minutes reporting (even though switched access reporting is an issue relevant to Qwest's 271 bid), *id.* p. 5, lines 18-21 & p. 9, lines 13-24; Qwest offered a monetary inducement to obtain testimony whenever requested by Qwest in a manner suitable to Qwest substantively, *id.* p. 9, lines 3-12;[1] and Qwest continued to violate Commission

[1] Eschelon refused to sign Qwest's documents containing these objectionable terms.

730 Second Avenue South • Suite 1200 • Minneapolis, MN 55402 • Voice (612) 376-4400 • Facsimile (612) 376-4411

orders requiring it to stay termination liability assessments for retail-to-resale conversions by charging them and then forcing a written agreement to obtain compliance with the Commission's Order, *id.* p. 10, lines 5-14. Eschelon confirms that Qwest engaged in this anti-competitive conduct.

TRADE SECRET DATA REDACTED

2

3

---

[2] TRADE SECRET DATA REDACTED

[3] The "10% discount" was part of an arrangement under which Qwest was supposed to purchase consulting services from Eschelon. Eschelon complained that the UNE-Eschelon ("UNE-E") rates were too high, as compared to the UNE-Platform ("UNE-P") rates. Rather than reduce the rates, Qwest suggested an unwritten pricing arrangement. Eschelon objected to that proposal and suggested a legitimate mechanism for Qwest to purchase valid consulting services from Eschelon to be reflected in a written agreement. Throughout discussions, Qwest suggested that it was concerned about what it characterized as unfair or overbroad use of opt-in provisions. Qwest's repeated protestations on this issue required Eschelon to present its proposal in light of this concern to gain acceptance of Eschelon's legitimate proposal. Therefore, Eschelon's President pointed out to Qwest that the proposal "'makes it more difficult for any party to opt into our agreements.'" Deanhardt Affidavit, p. 6, lines 18-19. His use of the term "opt into" shows that Eschelon's President envisioned at the time that, although more difficult to adopt because of the condition imposed by Qwest, the term may be available to other CLECs. Qwest could have filed this agreement with the commissions and made it available to other CLECs, but it did not do so. Eschelon welcomed the concept of being able to provide consulting to Qwest, because Eschelon believed that service improvements would result from Qwest taking advantage of Eschelon's CLEC perspective. Because the agreement was in writing, Eschelon believed that Qwest would have to honor it. Other CLECs would also ultimately benefit from improvements that were to be implemented as a result of the consulting services (and thus there was a royalty-type fee). Service quality improvements were critical to Eschelon's business,

TRADE SECRET DATA REDACTED

and Eschelon made a genuine effort to implement the consulting provision to attempt to achieve those improvements. After execution of the agreement, Eschelon formed teams organized by subject matter and spent significant resources identifying issues and preparing to meet with Qwest. In discovery, Eschelon has provided to the DOC more than 500 pages documenting Eschelon's efforts to launch the consulting effort. Despite Eschelon's efforts, Qwest refused to form corresponding teams or to otherwise truly accept consulting services. The fact that Qwest began to breach the agreement and treat it as a sham almost immediately sheds light not on the legitimate consulting arrangement proposed by Eschelon but on *Qwest's* intent and purpose in making the agreement. Moreover, since then, it has come to light that Qwest was entering into other purchase agreements, such as agreements ostensibly to purchase fiber capacity, for a discount. This additional information suggests that, from Qwest's perspective, the discount was a term of interconnection for Qwest, which never treated it as anything else. Either Qwest's rates are so inflated that these discounts still allow Qwest to earn a profit, or Qwest was willing to sell products below cost to keep other competitors out of the market. This suggests either anti-competitive behavior (rates above cost) or an antitrust violation (rates below cost in monopoly environment). (As the FCC has said that the issue of whether rates are cost-based is relevant to the 271 inquiry, the Commission may want to address this issue as part of its 271 proceedings as well.) Because Qwest imposed confidentiality restrictions on the agreements with various carriers, only Qwest was in a position to know that the term, while in the form of various types of purchase agreements, may have been, in reality, a term of interconnection.

[4] Also, although Qwest initially described the Escalations and Business Solutions Letter (*see* WCD-3) to Eschelon as a beneficial way to avoid disputes and work on a "business-to-business" basis, Qwest in fact used that letter to threaten Eschelon with alleged breaches and mischaracterize Eschelon as a "bad business partner." Qwest would call Eschelon's President or others and complain, often mischaracterizing facts and demanding an immediate answer without time for a proper response. Eschelon found itself in the position of having to justify itself to Qwest to avoid even worse consequences.

TRADE SECRET DATA REDACTED

TRADE SECRET DATA REDACTED

As indicated, Eschelon nonetheless agrees with Mr. Deanhardt's final conclusion that Qwest has leveraged "its control of the network through its wholesale division to benefit the efforts of its retail arm to obtain authority to offer interLATA long distance services." *See* Deanhardt Affidavit, p. 11, lines 3-5. Although Mr. Deanhardt reaches this conclusion, he may under-estimate the level of pressure that Qwest, with its monopoly power and control of the network, has been able to exert, particularly in the current economic climate. As a start-up company without the resources to take on Qwest on all fronts, Eschelon has had to deal with that pressure to the best of it abilities, while staying within the law in an area with little guidance or precedent. Doing so has not been easy, due to the pressures exerted by Qwest – Eschelon's only supplier in the vast majority of situations.[5]

Eschelon cannot control the conduct of Qwest, against which Eschelon has little bargaining power. And, Eschelon has had to choose its battles, given the risks of opposing its monopoly supplier. When a legal obligation belonged to Qwest, therefore, Eschelon could not take responsibility for Qwest's actions, nor should Eschelon or other CLECs have to do so. Qwest is responsible for meeting Qwest's obligations. For example, with respect to Qwest's obligation to file agreements, Eschelon agrees with the following quotation by Anthony Mendoza, the DOC deputy commissioner for telecommunications: "'[Qwest] is the only company that is required to disclose them to

[5]Although Eschelon reached agreements with Qwest in some instances, Eschelon also took the high-stakes risk of denying Qwest requests/proposals when necessary to avoid improper conduct and protect Eschelon's interests. *See, e.g.*, Qwest's Proposed Purchase Agreement & Qwest's Proposed Confidential Billing Settlement Agreement (Oct. 30, 2001) ["Qwest October 2001 Proposal"] (attached to, and discussed in, Eschelon's Level 3 Escalation Letter to Joseph P. Nacchio, dated Feb. 8, 2002), Exh. WCD-21.

the PUC.'" *See* "Qwest made secret agreements with competitors, regulators say," Steve Alexander, Minneapolis, *Star Tribune*, Feb 15, 2002. The obligation belongs to Qwest.[6]

Similarly, with respect to the 271 proceedings, the obligation to participate fully belongs to Qwest, as the party requesting 271 approval. Qwest has said that McLeod is its largest CLEC wholesale customer and Eschelon is its second largest CLEC wholesale customer. Qwest obtained, but did not disclose to regulators in the 271 proceedings, agreements with both of its largest CLEC wholesale customers not to oppose Qwest's 271 bid. Unlike Eschelon and McLeod, which have no legal duty to participate, Qwest bears the ultimate burden of proof as to its commercial performance on all checklist items, even if "no party files comments challenging compliance with a particular requirement." FCC BANY Order, ¶ 47.[7] Regardless of whether CLECs participate in 271 proceedings, therefore, Qwest has a duty to disclose problems with compliance as part of those proceedings.[8] Eschelon was certainly making Qwest aware of problems it

---

[6] The federal Act places the burden on Qwest to make terms of interconnection, if any, available to other CLECs, and therefore it is Qwest's responsibility to make that determination and file any such agreements pursuant to the Act. Placement of the burden on Qwest makes sense, because Qwest has superior access to information relevant to whether a term or condition is of the type for which filing is required. (For example, while a CLEC may believe that a term is in settlement of an individual dispute, Qwest is in a position to know whether the dispute is truly unique or the experience is shared by other CLECs and whether the same or similar solution is suitable for, and should be made available to, other CLECs.) Nothing in the agreements prevented Qwest from filing them. Qwest could have requested written consent for disclosure from CLECs at any time, if Qwest claims it was concerned about the confidentiality provisions that Qwest required as part of agreements.

[7] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. December 22, 1999) ["FCC BANY Order"].

[8] Eschelon does not know all that has transpired in the 271 proceedings and whether all information was disclosed. That is a matter for the commission to determine. Eschelon did notice the following statement by Qwest, which appears to create a different impression from Eschelon's experience: "Qwest is unaware of any circumstance, or any allegation of a circumstance, in which a party was prevented from offering any Utah-specific evidence at the multistate workshop specifically designed to address these issues. Qwest now asks the Commission to confirm that the parties opposing Qwest's section 271 authorization have had sufficient opportunity to present Utah-specific evidence supporting the UNE pricing, intrastate access charge, and other claims already resolved in Qwest's favor by Staff. Qwest further asks that the Commission clarify that, under the terms of the Report on Public Interest, it will entertain only such new evidence or arguments that the parties were demonstrably unable to offer in the Multistate Proceeding. Qwest submits that no such Utah-specific evidence or arguments exist." Qwest Corporation's Petition For Clarification And Reconsideration Of The Commission's Report On The Public Interest, *In the Matter of the Application of QWEST CORPORATION for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)*, Utah Docket No. 00-049-08, p. 6 (March 12, 2002). Although Qwest may argue that Eschelon and McLeod were not "prevented" from submitting evidence because Eschelon and McLeod "agreed" not to oppose Qwest in 271 proceedings, Qwest's decision not to disclose these agreements precluded parties and commissions from making that judgment for themselves. Moreover, Qwest's latter representation (that no Utah-specific evidence or arguments existed relating to UNE pricing, intrastate access charges, and other issues) is simply not the case. Before, during, and after the time that Qwest made this statement, Eschelon was raising evidence and arguments (including Utah-specific information) relating to problems with UNE pricing, access charges and other issues with Qwest. The evidence and arguments did exist and were known to Qwest.

was experiencing in the states in which Eschelon operates (Arizona, Colorado, Minnesota, Oregon, Utah, and Washington). Only Qwest controls, and is responsible for, whether Qwest meets its obligation to disclose those issues in discovery and 271 proceedings when Qwest has an obligation to do so. Qwest's conduct throughout the course of the 271 proceedings in meeting this obligation is relevant to the determination of whether granting 271 approval to Qwest is in the public interest. The public interest analysis, therefore, is broader than whether Qwest should have filed certain agreements and includes whether Qwest acted with appropriate candor to the commissions about the reason for CLEC non-participation in proceedings and with respect to CLEC concerns about service performance known to Qwest at the time.[9]

A key reason that the Commission and DOC are now able to review these issues is that Eschelon tried to ensure that matters were documented, despite Qwest proposals to enter into unwritten agreements and Qwest requests that Eschelon stop documenting events and turn over documents to Qwest. It has been a difficult task to document events in a manner that attempts to avoid threats and retaliation by Qwest while still resulting in documentation of some kind. The focus on whether agreements were ***filed*** with commissions fails to recognize the feat the Eschelon accomplished by getting anything in writing at all.[10] In contrast, McLeod's agreement not to oppose Qwest in 271 proceedings, for example, was reportedly an oral agreement. *See* "States Probe Qwest's Secret Deals To Expand Long-Distance Service," *Wall Street Journal*, p. A10 (April 20, 2002) ("As part of that deal, McLeod agreed to stop its opposition to the Qwest-U S West merger. The company also had a verbal agreement to not oppose Qwest's entry into long-distance, McLeod officials told regulators, a contention that Qwest does not dispute.").[11] Eschelon understands how Qwest could extract such an oral agreement, given Qwest's monopoly power and control over the network, and the circumstances confronting CLECs faced with Qwest's tactics. Eschelon obtained written agreements and confirmed events in writing. Mr. Deanhardt and others reviewing these issues are able to track and discuss the Eschelon agreements precisely because the information is in writing. Qwest would have had it otherwise, a fact that the Commission may want to review as part of the public interest analysis.

---

[9] The fact that some matters have since been settled does not mean that the matters never existed or did not need to be disclosed by Qwest at the time, nor does it mean that all underlying problems that lead to the settlement have been resolved so that other CLECs will not experience them. Eschelon still has unresolved disputes with Qwest, including the matter of missing switched access minutes and the 100% inaccuracy of the UNE-Star bills received from Qwest.

[10] Although written, the commitments were nonetheless not fully honored. Qwest breached the agreements in several respects, and promises made (such that UNE-Star would be a working alternative to UNE-P) did not materialize. *See, e.g.*, Affidavit of J. Jeffrey Oxley, *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation*, PUC Docket No. P-421/C-01-391 (April 18, 2002) (copy attached).

[11] As Qwest knew when proposing unwritten agreements, opting in to an unwritten agreement is a highly unlikely scenario. If the agreement is written, at least there is a better chance that the agreement will be produced in discovery or otherwise become known so that, if a determination is made that the agreement should have been filed, other CLECs may take advantage of it.

Qwest's conduct with respect to Eschelon, McLeod, or other CLECs with which Qwest had agreements (such as Covad, New Edge, or the other small CLECs),[12] needs to be reviewed in context. Qwest created, and is responsible for, the current situation and the fact that the market is still not truly open to competition. In the fall of 2000, Qwest's Chairman and Chief Executive Officer, Joseph Nacchio, publicly announced an agreement with McLeod, which he characterized as a significant positive development. He stood before the Regional Oversight Committee (ROC) and told members that Qwest was going to go behind closed doors and work out differences with CLECs, rather than litigate them. Representatives of Qwest repeatedly said they wanted to work on a "business-to-business" basis with Eschelon, rather than litigate issues. They also continually attempted to distinguish Qwest from the former company, US West, and asked for time to make the transition to become a more CLEC-friendly wholesale business.[13] Other CLECs and the commissions probably heard these same kinds of statements. As the Escalations and Business Solutions Letter (*see* WCD-3) shows, Eschelon's management wanted to believe in the promise of a better relationship under new management and attempted to use the non-litigious path touted by Qwest. It didn't work.

From the lack of competition in the market and our continued service problems that have not all been solved by ongoing proceedings and testing, it is apparent that the litigious path hasn't worked either. AT&T and WorldCom have not only actively participated in the 271 proceedings but also both successfully brought complaints against Qwest for anti-competitive behavior. The complaints took a long time to litigate (much longer than companies like Eschelon could bear), and neither company received any compensation as a result of the behavior, even though they had to expend substantial resources proving the anti-competitive behavior (more resources that Eschelon could afford). Despite all of this, the market is not truly open. Competitors have been stymied. Regulators have been too.

In other words, regardless of the party or approach taken, Qwest has succeeded in stonewalling and preventing development of competition. This conduct supports Mr. Deanhardt's final conclusion.

---

[12] See Amended Verified Complaint, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, MPUC Docket No. P-421/C-02-197 (March 19, 2002). The "small CLECs" include the following 10 CLECs: HomeTown Solutions, Hutchinson Telecommunications, Mainstreet Communications, Onvoy Communications, NorthStar Access, Otter Tail Telecom, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications, VAL-ED Joint Venture, and WETEC. *See id.* ¶ 196.

[13] Qwest also made negative statements about AT&T and WorldCom, indicating that those companies were not really interested in getting into business but had their own agendas to keep Qwest out of the interLATA market. Qwest encouraged Eschelon management to be different from those companies and work with Qwest outside of the regulatory arena to develop a better business relationship. Eschelon's management did not agree with Qwest, but Qwest's statements about AT&T and Worlcom show Qwest's strategy of casting CLECs as "good" business partners or "bad" business partners.

Eschelon appreciates this opportunity to file comments and clarify the record. Eschelon also requests an opportunity for oral presentation pursuant to Minnesota Rules, Part 7829.0900.

Sincerely,

J. Jeffrey Oxley

J. Jeffrey Oxley
Vice President, General Counsel, and Corporate Secretary

cc: Service List

EXHIBIT 2

SUBJECT TO RULE OF EVIDENCE 408

CONFIDENTIAL BILLING SETTLEMENT AGREEMENT

This Confidential Billing Settlement Agreement ("Agreement"), dated April 28, 2000, is between U S WEST Communications, Inc. ("U S WEST") and McLeodUSA, Inc. ("McLeodUSA") who hereby enter into this Confidential Billing Settlement Agreement with regard to the following:

RECITALS

1. U S WEST is an incumbent local exchange provider operating in the states of Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

2. McLeodUSA is a competitive local exchange provider that will soon operate in all fourteen states of U S WEST's operating region.

3. Whereas both U S WEST and McLeodUSA have entered into interconnection agreements pursuant to the federal Telecommunications Act of 1996 ("Act"), under Section 251 and 252 of that Act, and those agreements have been approved by the appropriate state commissions where those agreements were filed pursuant to the Act. U S WEST and McLeodUSA operate under those agreements in certain states, as well as various state and federal tariffs.

4. McLeodUSA has intervened in the U S WEST/QWEST merger proceedings that have been or are being conducted by several states within U S WEST's 14-state region, including Arizona, Minnesota, Montana, Utah, Washington and Wyoming.

5. Disputes between the parties have arisen in a number of states under

both the interconnection agreements and tariffs regarding a number of billing issues, including nonblocked Centrex service, subscriber list information charges, reciprocal compensation and interim pricing.

6. In an attempt to finally resolve those issues in dispute, including McLeodUSA's opposition to the merger, and avoid delay and costly litigation, the parties voluntarily enter into this Confidential Billing Settlement Agreement to resolve all disputes, claims and controversies between the parties, as of the date of this Agreement that relate to the matters addressed herein and release all claims related to those matters.

CONFIDENTIAL BILLING SETTLEMENT AGREEMENT

1. In consideration for McLeodUSA's withdrawal from the merger dockets, and within five (5) business days after McLeodUSA has withdrawn its opposition to the merger in all states and dismissed its pending FCC complaint regarding subscriber list information charges, U S WEST will pay McLeodUSA $4.2 million to resolve the nonblocked Centrex service and subscriber list information billing disputes. The form of payment will consist of bill credits (if payment has not been made) or cash payments to McLeodUSA.

2. Effective upon merger closure and subject to the additional terms described below, U S WEST will pay McLeodUSA $25.5 million to resolve miscellaneous billing disputes. The form of payment will consist of a cash payment to McLeodUSA, payable within five (5) business days following merger closure.

a. Nonblocked Centrex Service: Subject to McLeodUSA's withdrawal from the merger dockets and dismissal of its FCC complaint, McLeodUSA and U S WEST agree

that upon payment to McLeodUSA of the $4.2 million described in paragraph 1, all disputed Centrex related charges incurred through March 31, 2000 have been fully resolved and all claims for such charges are released. Effective immediately, for Centrex service charges incurred on a going-forward basis, the parties will continue to negotiate, in good faith, a business-to-business resolution.

b. Subscriber List Information Charges: Subject to McLeodUSA's withdrawal from the merger dockets and dismissal of its FCC complaint, U S WEST and McLeodUSA agree that upon payment to McLeodUSA of the $4.2 million described in paragraph 1, all disputed amounts incurred through March 31, 2000 have been fully resolved and all claims for such charges are released. McLeodUSA agrees to immediately dismiss its pending FCC complaint regarding subscriber list information charges. Effective immediately, on a going-forward basis, McLeodUSA will pay the $.04 (per listing for initial load) and $.06 (per listing for updates) rates for subscriber list information or such other final rates as may be established by any cost docket proceedings or rates the parties may negotiate, in good faith, on a business-to-business basis. Both parties reserve the right to participate fully in future rate determination proceedings.

c. Compensation for Traffic Exchange: Upon payment to McLeodUSA of the $4.2 million described in paragraph 1, in all existing and future states, for the period of March 1, 2000 through December 31, 2002, the parties agree to immediately amend their existing interconnection agreements to change the reciprocal compensation terms from a usage-based system to a "bill and keep" arrangement for local and internet-related traffic, and to incorporate such a bill and keep arrangement into any future

interconnection agreements in any of U S WEST's fourteen states. Subject to merger closure, both parties agree not to bill usage to one another in any existing or future state between March 1, 2000 and the date of merger closure. However, in the event that the merger between U S WEST and QWEST does not close, U S WEST will retroactively bill McLeodUSA for the true-up for reciprocal compensation for usage through February 29, 2000 at the appropriate state commission-approved rates. Both parties may bill each other retroactively for the usage not billed between March 1, 2000 and the date on which it is officially announced that the merger will not close, based on appropriate state commission-approved rates or the currently existing interconnection agreement(s). U S WEST and McLeodUSA agree to pay the undisputed portion of such retroactive usage billing at the appropriate state commission-approved rates within five (5) business days of receiving each other's invoices for the same. In addition, if the merger does not close, the parties will immediately amend their existing interconnection agreements accordingly.

d. Interim Pricing: Subject to merger closure and in consideration for the bill and keep arrangement agreed upon above, U S WEST and McLeodUSA agree that all interim rates, except reciprocal compensation rates, will be treated as final and any final commission orders entered in any of the 14 states in U S WEST's territory through April 30, 2000, and on a going-forward basis through December 31, 2002, (except as such orders may relate to reciprocal compensation rates for the period between March 1, 2000 and December 31, 2002—reciprocal compensation is addressed in paragraph 2.c. of this agreement) will be applied prospectively to McLeodUSA, and not retroactively. In addition, U S WEST agrees that this settlement term will apply throughout the terms

of the parties' existing interconnection agreements. Thus, both Parties agree not to bill each other for any true-ups associated with final commission orders that affect interim prices and release claims for such true-ups.

e. Centrex Service Agreements: For McLeodUSA's five-year Centrex Service Agreements that expire before December 31, 2002, the Parties agree to extend the terms and pricing of those agreements until December 31, 2002.

3. For valuable consideration mentioned above, the receipt and sufficiency of which are hereby acknowledged, McLeodUSA and U S WEST do hereby release and forever discharge the other and the other's associates, owners, stockholders, predecessors, successors, agents, directors, officers, partners, employees, representatives, employees of affiliates, employees of parents, employees of subsidiaries, affiliates, parents, subsidiaries, insurance carriers, bonding companies and attorneys, from any and all manner of action or actions, causes or causes of action, in law, under statute, or in equity, suits, appeals, petitions, debts, liens, contracts, agreements, promises, liability, claims, affirmative defenses, offsets, demands, damages, losses, costs, claims for restitution, and expenses, of any nature whatsoever, fixed or contingent, known or unknown, past and present asserted or that could have been asserted or could be asserted in any way relating to or arising out of the billing disputes/matters addressed herein.

4. The terms and conditions contained in this Confidential Billing Settlement Agreement shall inure to the benefit of, and be binding upon, the respective successors, affiliates and assigns of the Parties.

5. McLeodUSA hereby covenants and warrants that it has not assigned or

transferred to any person any claim, or portion of any claim which is released or discharged by this Confidential Billing Settlement Agreement.

6. The Parties expressly agree that they will keep the substance of the negotiations and or conditions of the settlement and the terms or substance of this Confidential Billing Settlement Agreement strictly confidential. The parties further agree that they will not communicate (orally or in writing) or in any way disclose the substance of negotiations and/or conditions of the settlement and the terms or substance of this agreement to any person, judicial or administrative agency or body, business, entity or association or anyone else for any reason whatsoever, without the prior express written consent of the other party unless compelled to do so by law. It is expressly agreed that this confidentiality provision is an essential element of this Confidential Billing Settlement Agreement. The parties agree that this Confidential Billing Settlement Agreement and negotiations, and all matters related to these two matters, shall be subject to the Rule 408 of the Rules of Evidence, at the federal and state level.

7. In the event either Party has a legal obligation which requires disclosure of the terms and conditions of this Confidential Billing Settlement Agreement, the Party having the obligation shall immediately notify the other Party in writing of the nature, scope and source of such obligation so as to enable the other Party, at its option, to take such action as may be legally permissible so as to protect the confidentiality provided for in this agreement.

8. This Confidential Billing Settlement Agreement constitutes the entire agreement between the Parties and can only be changed in a writing or writings executed by both of the Parties. Each of the Parties forever waives all right to assert

that this Confidential Billing Settlement Agreement was a result of a mistake in law or in fact.

9. This Confidential Billing Settlement Agreement shall be interpreted and construed in accordance with the laws of the State of Colorado, and shall not be interpreted in favor or against any Party to this agreement.

10. The Parties have entered into this Confidential Billing Settlement Agreement after conferring with legal counsel.

11. If any provision of this Confidential Billing Settlement Agreement should be declared to be unenforceable by any administrative agency or court of law, the remainder of the Confidential Billing Settlement Agreement shall remain in full force and effect, and shall be binding upon the Parties hereto as if the invalidated provision were not part of this Confidential Billing Settlement Agreement.

12. Any claim, controversy or dispute between the Parties in connection with this Confidential Billing Settlement Agreement shall be resolved by private and confidential arbitration conducted by a single arbitrator engaged in the practice of law under the then current rules of the American Bar Association. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, not state law, shall govern the arbitrability of all disputes. The arbitrator shall only have the authority to determine breach of this agreement, but shall not have the authority to award punitive damages. The arbitrator's decision shall be final and binding and may be entered in any court having jurisdiction thereof. Each party shall bear its own costs and attorneys' fees and shall share equally in the fees and expenses of the arbitrator.

13. The Parties acknowledge and agree that they have a legitimate billing

dispute about the issues described in this Confidential Billing Settlement Agreement and that the resolution reached in this agreement represents a compromise of the Parties' positions. Therefore, the Parties agree that resolution of the issues contained in this agreement cannot be used against the other Party.

14. This Confidential Billing Settlement Agreement may be executed in counterparts and by facsimile.

IN WITNESS THEREOF, the Parties have caused this Confidential Billing Settlement Agreement to be executed as of this day, 28TH of April 2000.

McLeodUSA, Inc.	U S WEST Communications, Inc.
By: [signature]	By: _____
Title: PRESIDENT	Title: _____
Date: 4/28/2000	Date: _____

dispute about the issues described in this Confidential Billing Settlement Agreement and that the resolution reached in this agreement represents a compromise of the Parties' positions. Therefore, the Parties agree that resolution of the issues contained in this agreement cannot be used against the other Party.

14. This Confidential Billing Settlement Agreement may be executed in counterparts and by facsimile.

IN WITNESS THEREOF, the Parties have caused this Confidential Billing Settlement Agreement to be executed as of this day, 27th of April 2000.

McLeodUSA, Inc.

By: _____

Title: PRESIDENT

Date: 4/25/2000

U S WEST Communications, Inc.

By: _____

Title: President - Wholesale Mkts

Date: 4/28/00

Q110443

EXHIBIT 3

April 19, 2000

U S WEST Service Level Agreement with Covad Communications Company Unbundled Loop Services

U S WEST is committed to provide its customers excellent service. In an effort to meet Covad's request, and to provide increased service to other co-providers, U S WEST agrees to make demonstrable improvements to its provisioning service performance on unbundled loops, in order to reach within a reasonable time the following service quality standards in the metropolitan areas where Covad provides to U S WEST wire center forecasts. These quality standards would apply under normal operating conditions, but they would not establish a level of performance to be achieved during periods of emergency, catastrophe, natural disaster, severe storm or other events affecting large numbers of telecommunications customers. These standards would not apply under extraordinary or abnormal conditions of operations such as those resulting from work stoppage or slowdown, or during periods of civil unrest. They would not apply during events outside the control or responsibility of U S WEST, such as cable cuts by third parties, vandalism, or conditions prompted by vendors or suppliers. The parties have agreed that U S WEST's performance will increase on step-level increments with a commitment to reach these service levels within 90 days.

1. FOC Process

U S WEST will provide 90% of Covad's Firm Order Confirmation (FOC) dates within 48 hours of receipt of properly completed service requests for POTS unbundled loop services. It is understood that these POTS services will not require loop conditioning activity of any sort (load coil or bridged tap removal). U S WEST will notify Covad of any facilities shortage issues for DSL capable, ISDN capable and DS1 capable services within this same 48-hour time period.

For DSL capable, ISDN capable and DS1 capable unbundled loop services, U S WEST will provide 90% of Covad's FOC dates within 72 hours of receipt of properly completed service requests. As part of the 72-hour FOC process, U S WEST will dispatch a technician to verify the existence of suitable facilities prior to providing Covad an FOC date.

2. Service Intervals

When facilities are available, U S WEST will provide Covad with unbundled loop service that does not require loop conditioning consistent with U S WEST's published Standard Interval Guide, as of March 31, 2000 at least 90% of the time. The standard intervals will not apply if Covad requests a later completion date, or if the order is delayed for customer cause, or reasons outside U S WEST's control. US WEST will provide Covad with line sharing service (access to the high frequency spectrum network element) at least 90% of the time within the intervals set forth in any line sharing agreement between Covad and U S WEST.

3. New Service Failures

U S WEST recognizes the need for a quality provisioning process, and is committed to providing circuits which are properly conditioned, tested and released right the first time. U S WEST will reduce the incidence of failure on new Covad circuits to less than 10% failure within the first 30 calendar days. For purposes of measurement, "failures" would be defined as U S WEST troubles, or troubles attributed to U S WEST facilities and central office equipment, or to U S WEST employees. "Failures" would not include repair tickets which are informational in nature, or troubles isolated outside the U S WEST network.

4. Facilities Problems

Covad service requests which are accepted, but can not be completed due to lack of facilities, would be resolved through the U S WEST "held order" process. For those service requests held due to line conditioning, U S WEST will provide Covad the option of paying for the line conditioning at the appropriate rate approved by the relevant State Commission, which U S WEST will complete in 24 days or less 90% of the time. Where U S WEST has commited to bulk conditioning in certain localities, U S WEST will provide Covad the additional option of retaining those service requests until U S WEST has completed the bulk conditioning in that locality. U S WEST will then process the service request and not charge Covad for the line conditioning. In these situations where the end user customer is served by digital loop carrier or off pair gain, U S WEST will notify Covad of that situation and provide it the option of submitting a service request for an ISDN capable loop compliant with TR-393 standards and U S WEST Technical Publication 77399. U S WEST will, where technically feasible, either install an appropriate ISDN card for those end user customers served by digital loop carrier or provide another ISDN option for those served off of pair gain in 10 days or less 90% of the time. Where it would not impact a current end user customer, U S WEST will perform a line and station transfer in order to provision the Covad service request in 10 days or less 90% of

the time. In a parallel effort, U S WEST will resolve those orders already being held for lack of facilities within the next 60 days in the manner described in this paragraph for new service requests. For all service requests for which facilities cannot be made available in the manner described in this paragraph, U S WEST will notify Covad of that fact and, at the option of Covad, either place the service request on a service inquiry list or cancel or reject the service request.

Based on U S WEST's commitment to meet these service performance standards, Covad commits to withdrawing its opposition to the U S WEST/Qwest merger. U S WEST acknowledges that the resolutions reached in this service level agreement are for settlement purposes only and do not necessarily represent the position that Covad would take if it continued to litigate this proceeding. This service level agreement is not intended to modify, alter or waive any existing or future legal or contractual requirements that U S WEST provide service in shorter intervals or at a higher success rate than set forth in this agreement. Covad specifically reserves the right to take positions contrary to the resolutions agreed to in this service level agreement in any future proceeding before any state or federal regulatory, judicial or administrative body and to argue for entirely different results in any future proceeding before any state or federal regulatory, judicial or administrative body.

Dated: April 19, 2000

Ken G Marcotte

Ken G Marcotte

Vice President, by Ann M. Lara

U S WEST Network Complex Services

Catherine Hemmer

Catherine Hemmer

Executive Vice President,

Covad Communications Company

Certificate of Service

I, Lonzena Rogers, do hereby certify, that on this twenty-ninth day of May, 2002, I have caused a true and correct copy of WorldCom, Inc.'s Comments in the matter of WC Docket No. 02-89 to be served by United States Postal Service first class postage, hand delivery and facsimile on the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
Portals II
445 Twelfth Street, SW
Suite TW-A325
Washington, DC 20554

Janice M. Myles
Competition Policy Division
Federal Communications Commission
Portals II
445 Twelfth Street, SW
Room 5-C327
Washington, DC 20554

David L. Sieradzki
Peter A. Rohrbach
Hogan & Hartson L.L.P.
555 Thirteenth Street, NW
Washington, DC 20554

Qualex International
Portals II
Federal Communications Commission
445 Twelfth Street, SW
Room CY-A257
Washington, DC 20554

Lonzena Rogers